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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTURO NAVA,

Defendant and Appellant.

H037683

(Monterey County
Super. Ct. No. SS110508A)

I. INTRODUCTION

Defendant Arturo Nava pleaded no contest to assault with a deadly weapon (former Pen. Code, § 245, subd. (a)(1)).¹ On September 30, 2011, the trial court imposed a three-year prison sentence, suspended execution of the sentence, and placed defendant on probation for three years with various terms and conditions. Relevant to this appeal, the probation conditions generally prohibit defendant from possessing alcohol and controlled substances, and require that he stay away from the victims. The court granted defendant 301 days of presentence custody credits, consisting of 201 actual days plus 100 days conduct credit under section 4019.

¹ Further unspecified statutory references are to the Penal Code.

On appeal, defendant contends that the probation conditions restricting his possession of alcohol and controlled substances and requiring that he stay away from the victims are unconstitutionally vague and/or overbroad. He also argues that he is entitled to additional conduct credit under the October 2011 version of section 4019.

For reasons that we will explain, we will modify the judgment relating to the ordered conditions of probation and affirm the judgment as so modified.

II. FACTUAL AND PROCEDURAL BACKGROUND

As defendant was convicted by plea, the summary of his offense is taken from the probation report, which was based on a report by the Salinas Police Department. In March 2011, defendant visited his son and his son's wife. After drinking all night with his son, defendant cut his son's neck with a small pocket knife and thereafter chased him with the knife in hand.

In July 2011, defendant was charged by information with assault by means of force likely to produce great bodily injury or with a deadly weapon (former § 245, subd. (a)(1)). The information further alleged that defendant used a dangerous and deadly weapon, a knife, in the commission of the offense (§§ 667, 1192.7). On September 15, 2011, defendant pleaded no contest to the assault count and admitted the accompanying allegation, after the court indicated that it would sentence defendant to three years, suspend execution of the sentence, and place defendant on probation with various terms and conditions, including that he serve one year in jail followed by residential treatment.

On September 30, 2011, the trial court sentenced defendant to the middle term of three years, suspended execution of the sentence, and placed defendant on probation for three years with various terms and conditions, including that he not possess alcohol, that he not possess controlled substances except as specified, and that he stay away from his son and his son's wife. The court granted defendant 301 days of presentence custody credits, consisting of 201 actual days plus 100 days conduct credit.

III. DISCUSSION

A. Probation Conditions

Defendant challenges certain probation conditions restricting the possession of alcohol, the possession of controlled substances, and his contact with the victims, on the grounds that the conditions are unconstitutionally vague and/or overbroad.

As relevant to defendant's contentions on appeal, the trial court orally stated defendant's probation conditions at the September 30, 2011 sentencing hearing as follows: "You will not possess or consume any alcohol. [¶] And you will stay away from all locations where the sale or consumption of alcohol is the primary business. [¶] You'll also not possess or consume any controlled substance except under a doctor's direction. [¶] And you'll not associate with anyone you know to traffic in or consume illegal drugs. [¶] . . . [¶] You'll stay at least 100 yards from [your son and your son's spouse] and their residence, vehicles, and places of employment."

In the minute order of the September 30, 2011 sentencing hearing, which was signed and dated by the trial court on October 11, 2011, the probation conditions concerning alcohol, controlled substances, and the victims are stated as follows:

"7. Totally abstain from the use of alcoholic beverages, not purchase or possess alcoholic beverages, and stay out of places when it is the main item of sale.

"8. Not use or possess alcohol/narcotics, intoxicants, drugs, or other controlled substances without the prescription of a physician; not traffic in, or associate with [persons] known to defendant to use or traffic in narcotics or other controlled substances.

"[¶] . . . [¶] 12. Stay away at least 100 yards from victim, victim's residence, vehicle and place of employment."

Although the probation conditions as reflected in the minute order signed by the court are not verbatim to the probation conditions as orally stated by the court, the substance of the conditions are generally the same and any small differences are not material to the issues on appeal. We will therefore rely on the minute order signed by the

court as reflecting the probation conditions imposed on defendant. (See *People v. Thrash* (1978) 80 Cal.App.3d 898, 901-902.)

Before turning to the substance of defendant's constitutional claims, we first consider whether the claims have been forfeited by his failure to raise them below. Our Supreme Court has determined that the forfeiture rule does not apply when a probation condition is challenged as unconstitutionally vague or overbroad on its face and the claim can be resolved on appeal as a pure question of law without reference to the sentencing record. (*In re Sheena K.* (2007) 40 Cal.4th 875, 887-889 (*Sheena K.*); see also *People v. Leon* (2010) 181 Cal.App.4th 943, 949 (*Leon*).) In this case, we will consider the substance of defendant's claims to the extent they present pure questions of law without reference to the sentencing record.

1. Condition No. 7

Condition No. 7 states: "Totally abstain from the use of alcoholic beverages, not purchase or possess alcoholic beverages, and stay out of places when it is the main item of sale."

Defendant contends that this probation condition is vague and overbroad because it does not include an explicit knowledge requirement regarding possession of the prohibited item. Defendant further contends that the probation condition is "defective" because he may be found in violation "by entering a place where he did not know that alcohol was the main item of sale at that place." Defendant proposes that "knowingly" and "know" be added to the probation condition.

The Attorney General "does not object" to modifying any of the probation conditions at issue to include a "knowledge requirement." Further, with respect to the requirement that defendant stay out of places where alcohol is the main item of sale, the Attorney General suggests that the probation condition "could" include the phrase that defendant "knows or reasonably should know" the sale or consumption of alcohol is the primary business.

In reply, defendant objects to the “reasonably should know” language on the ground that it would render the probation condition unconstitutionally vague.

“A probation condition that imposes limitations on a person’s constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.” (*Sheena K.*, *supra*, 40 Cal.4th at p. 890; *Leon*, *supra*, 181 Cal.App.4th at pp. 948-949.) In addition, “[a] probation condition ‘must be sufficiently precise for the probationer to know what is required of him [or her], and for the court to determine whether the condition has been violated,’ if it is to withstand a [constitutional] challenge on the ground of vagueness.” (*Sheena K.*, *supra*, at p. 890; *Leon*, *supra*, at p. 949; *People v. Freitas* (2009) 179 Cal.App.4th 747, 750 (*Freitas*)). “[T]he underpinning of a vagueness challenge is the due process concept of ‘fair warning.’ [Citation.] The rule of fair warning consists of ‘the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders’ [citation], protections that are ‘embodied in the due process clauses of the federal and California Constitutions. [Citations.]’ [Citation.]” (*Sheena K.*, *supra*, at p. 890.) In order to be sufficiently precise for the probationer to know what is required of him or her, a requirement of knowledge should be included in probation conditions prohibiting the possession of specified items. (*Freitas*, *supra*, at pp. 751-752.) “[T]he law has no legitimate interest in punishing an innocent citizen who has no knowledge of the presence of [the prohibited items].” (*Id.* at p. 752.)

In this case, we shall modify the probation condition by including an explicit knowledge requirement. (*Freitas*, *supra*, 179 Cal.App.4th at pp. 751-752.) We do not decide the issue of whether the “reasonably should know” language, as proposed by the Attorney General, is also necessary or proper. As noted, the Attorney General does not object to the inclusion of the language proposed by defendant and only suggests, without any substantive analysis, that the probation condition “could” also include the “reasonably should know” language.

Accordingly, we shall modify condition No. 7 to state: “Totally abstain from the knowing use of alcoholic beverages, not knowingly purchase or possess alcoholic beverages, and stay out of places when you know it is the main item of sale.”

2. Condition No. 8

Condition No. 8 states: “Not use or possess alcohol/narcotics, intoxicants, drugs, or other controlled substances without the prescription of a physician; not traffic in, or associate with [persons] known to defendant to use or traffic in narcotics or other controlled substances.”

Defendant contends that this probation condition is vague and overbroad because it does not include an explicit knowledge requirement regarding possession of the prohibited items and regarding the nature of the illegal drugs. Defendant further contends that the probation condition is overbroad with respect to the term “drugs” because the probation condition prohibits him from using or possessing items such as Tylenol or aspirin. Defendant proposes that “knowingly” and “know” be added to the probation condition, and that the reference to drugs be limited to “illegal” drugs.

The Attorney General does not object to defendant’s proposed modifications.

We shall modify condition No. 8 by including an explicit knowledge requirement, by inserting “illegal” before the term “drugs,” and by removing the redundant reference to alcohol possession and use which are already covered by condition No. 7, so that condition No. 8 states: “Not knowingly use or possess narcotics, intoxicants, illegal drugs, or other controlled substances without the prescription of a physician; not traffic in, or associate with persons known to defendant to use or traffic in narcotics or other controlled substances.”

3. Condition No. 12

Condition No. 12 states: “Stay away at least 100 yards from victim, victim’s residence, vehicle and place of employment.”

Defendant acknowledges that he knows the victims, who are his son and his son's wife, and that he knows where they live. He contends that the probation condition is nevertheless vague and overbroad because it lacks an explicit knowledge requirement regarding the location of the victims' vehicles or places of employment. Defendant argues that he "could be found in violation for parking his car near the victims' car in a public place such as a shopping center without having knowledge that the car belonged to the victims." Defendant proposes that the probation condition be modified to state that he is prohibited from "knowingly" coming within 100 yards of the victims or the specified places.

The Attorney General does not object to including an explicit knowledge requirement. The Attorney General suggests that the probation condition "could" include the phrase "known or reasonabl[y] should be known" to defendant.

In reply, defendant objects to the "reasonably should be known" language on the ground that it would render the probation condition unconstitutionally vague.

We shall modify the probation condition by including an explicit knowledge requirement because defendant could unknowingly violate the condition as currently written. Defendant could not be expected to know all the locations to which the victims will travel. We determine that the probation condition must include an express knowledge requirement to give defendant fair warning of what locations he must avoid. (See *Sheena K.*, *supra*, 40 Cal.4th at p. 890.)

We do not decide the issue of whether the "reasonably should know" language, as proposed by the Attorney General, is also necessary or proper. As noted, the Attorney General does not object to the inclusion of the language proposed by defendant and only suggests, without any substantive analysis, that the probation condition "could" also include the "reasonabl[y] should be known" language.

Accordingly, we shall modify condition No. 12 to state: "Do not knowingly come within 100 yards of the victims, their residence, vehicles, and places of employment."

B. Conduct Credit

At the sentencing hearing on September 30, 2011, the trial court granted defendant 301 days of presentence custody credits, consisting of 201 actual days plus 100 days conduct credit. On appeal, defendant contends that his conduct credit should be calculated pursuant to the current version of section 4019, which was operative after he was sentenced in September 2011, and that, under the current version, he is entitled to 200 days conduct credit instead of the 100 days awarded by the court.

The current version of section 4019 generally provides that a defendant may earn conduct credit at a rate of two days for every two-day period of actual custody. (§ 4019, subds. (b), (c) & (f).) However, the current version of section 4019 states that the conduct credit rate “shall apply prospectively and shall apply to prisoners who are confined to a county jail [or other local facility] for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law.” (§ 4019, subd. (h).) In this case, defendant committed his crime and was sentenced *prior* to October 1, 2011. Thus the October 2011 version of section 4019, which provides for prospective application, does not apply to defendant. (§ 4019, subd. (h); *People v. Brown* (2012) 54 Cal.4th 314, 322, fn. 11 (*Brown*); *People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9 (*Lara*); *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1550 (*Ellis*).)

Defendant contends that the equal protection clauses of the state and federal Constitutions require that the October 2011 version of section 4019 be retroactively applied to him.

“The concept of equal protection recognizes that persons who are similarly situated with respect to a law’s legitimate purposes must be treated equally. [Citation.] Accordingly, ‘ “[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” ’ [Citation.] ‘This initial inquiry is not

whether persons are similarly situated for all purposes, but “whether they are similarly situated for purposes of the law challenged.” ’ [Citation.]” (*Brown, supra*, 54 Cal.4th at p. 328.)

We find *Brown* instructive on the equal protection issue raised by defendant in this case. In *Brown*, the California Supreme Court held that a former version of section 4019, effective January 25, 2010, applied prospectively, and that the equal protection clauses of the federal and state Constitutions did not require retroactive application. (*Brown, supra*, 54 Cal.4th at p. 318.) In addressing the equal protection issue, the court determined that “prisoners who served time before and after [the January 2010 version of] section 4019 took effect are not similarly situated” (*Brown, supra*, at p. 329.) On this point, the California Supreme Court found *In re Strick* (1983) 148 Cal.App.3d 906, “persuasive” and quoted from that decision as follows: “ ‘The obvious purpose of the new section,’ . . . ‘is to affect the behavior of inmates by providing them with incentives to engage in productive work and maintain good conduct while they are in prison.’ [Citation.] ‘[T]his incentive purpose has no meaning if an inmate is unaware of it. The very concept demands prospective application.’ [Citation.] ‘Thus, inmates were only similarly situated with respect to the purpose of [the new law] on [its effective date], when they were all aware that it was in effect and could choose to modify their behavior accordingly.’ [Citation.]” (*Brown, supra*, at p. 329.) The California Supreme Court also disagreed with the defendant’s contention that its decision in *People v. Sage* (1980) 26 Cal.3d 498 “implicitly rejected the conclusion” that the Court of Appeal reached in *Strick*, namely “that prisoners serving time before and after a conduct credit statute takes effect are not similarly situated.” (*Brown, supra*, at p. 329.)

Defendant argues that his case is analogous to *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*), where the California Supreme Court concluded that equal protection required the retroactive application of a statute granting credit for time served in local custody before sentencing and commitment to state prison. In *Brown*, however, the

California Supreme Court explained that “*Kapperman* does not hold or suggest that prisoners serving time before and after the effective date of a statute authorizing *conduct* credits are similarly situated.” (*Brown, supra*, 54 Cal.4th at p. 330.)

Further, we observe that in a footnote in *Lara*, the California Supreme Court rejected the contention, similar to the one made by defendant in this case, that the prospective application of the October 2011 version of section 4019 denied the defendant equal protection. (*Lara, supra*, 54 Cal.4th at p. 906, fn. 9.) Citing *Brown*, the California Supreme Court in *Lara* explained that prisoners who serve their pretrial detention before the effective date of a law increasing conduct credits, and those who serve their detention thereafter, “are not similarly situated with respect to the law’s purpose.” (*Lara, supra*, at p. 906, fn. 9; but see *People v. Verba* (2012) 210 Cal.App.4th 991, 995-996, petn. for review pending, petn. filed Dec. 7, 2012, S207193.)

Defendant also argues for the first time in his reply brief that a pretrial detainee who is unable to afford bail may actually serve more time in custody than a wealthier counterpart who is able to make bail before being sentenced to an identical prison term. Defendant argues that this disparate treatment results from the fact that the defendant who makes bail is subsequently able to earn postsentence credits on a one-for-one basis (§ 2933), whereas some defendants who do not make bail will earn presentence conduct credit at a less favorable rate. Defendant contends that equal protection therefore requires the current version of section 4019, which provides for conduct credit at a rate of two days for every two-day period of actual custody, be retroactively applied to him.

Defendant’s contention is forfeited by his failure to raise it earlier. (See *People v. Peevy* (1998) 17 Cal.4th 1184, 1206; *People v. Smithey* (1999) 20 Cal.4th 936, 1017, fn. 26.) Further, the contention is without merit. “[T]he pre- and postsentence credit systems serve disparate goals and target persons who are not similarly situated.” (*People v. Buckhalter* (2001) 26 Cal.4th 20, 36.) Defendant thus fails to demonstrate an equal protection violation. (See *People v. Heard* (1993) 18 Cal.App.4th 1025 [differences in

conduct credit formulas for pretrial detainees under former section 4019 and state prison inmates under section 2931 did not violate equal protection].)

Accordingly, following *Brown* and *Lara*, we determine that defendant is not entitled to additional conduct credit under the October 2011 version of section 4019. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; see *Ellis, supra*, 207 Cal.App.4th at p. 1548 [“prospective-only application” of the October 2011 version of section 4019 does not violate equal protection].)

IV. DISPOSITION

The judgment (order of probation) is ordered modified as follows.

Probation condition No. 7 is modified to state: “Totally abstain from the knowing use of alcoholic beverages, not knowingly purchase or possess alcoholic beverages, and stay out of places when you know it is the main item of sale.”

Probation condition No. 8 is modified to state: “Not knowingly use or possess narcotics, intoxicants, illegal drugs, or other controlled substances without the prescription of a physician; not traffic in, or associate with persons known to defendant to use or traffic in narcotics or other controlled substances.”

Probation condition No. 12 is modified to state: “Do not knowingly come within 100 yards of the victims, their residence, vehicles, and places of employment.”

As so modified, the judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.